Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

JOHN WALTER NELSON,
Petitioner,
v

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNTY COURT, COUNTY OF DOUGLAS, STATE OF COLORADO
Action No. 99M999 Division B

TRANSCRIBER'S TRANSCRIPT

PEOPLE OF THE STATE OF COLORADO
Plaintiff
v
JOHN WALTER NELSON
Defendant

THIS MATTER came on for hearing on January 6, 2000, before THE HONORABLE SUSANNA MEISSNER-CUTLER, Judge, of the County Court, sitting in Castle Rock, Colorado.

APPEARANCES:
FOR THE PEOPLE: GINENE HATTER
FOR THE DEFENDANT: STEPHEN CALDER

THE COURT: We are on the record on 99M999, the People versus John Nelson.
MS. HATTER: Ginene Hatter and Greg Klingenberg on behalf of the People.
MR. CALDER: Good morning, Your Honor. Steve Calder on behalf of the defendant, who is present.
THE COURT: Thank you. This matter comes on for jury trial today, and my understanding is everybody is ready to proceed, and Defense has a motion outstanding, is that right?
MR. CALDER: That's correct, Your Honor.
MS. HATTER: That's correct, Your Honor, but I would like to notify the Court that I was informed that Deputy Mark Conrad, who is a necessary witness is ill. We are checking into how ill he is and if he will be available. I just wanted to put the Court on notice that we are working on that issue.
MR. CALDER: Your Honor, in addition, I would like the Court to know that depending upon the outcome of the motion that's before the Court, I may have an additional motion with regard to the trial itself, if the motion is denied, I would like to have some time to prepare and file a 106 procedure.
THE COURT: I understand. I guess, Mr. Calder, at this point I must express some disappointment in the fact that the last time we had met regarding this case, I expressed to you the fact that this Court

did not want to call a jury panel in, if we were not proceeding on this case. That this Court specially called the panel in today to sit and hear this case, and I'm somewhat disappointed in the fact that when trial call occurred last Thursday, the Court was not appropriately informed and unfortunately had trial call proceeded as it should in all cases, perhaps we would have addressed this motion in a more timely fashion---

MR. CALDER: May I---

THE COURT: With that being said, Mr. Calder, I will hear your motion.

MR. CALDER: May I respond to that, Your Honor. First of all, when we were in court last time, I've since learned that I may have been mistaken about this from your clerk, but I understood the Court to say that I---because I was going to be out of town for the holidays, that I could call in on or before the 22nd---let's see was it the-whatever the trial call date was. I believe that was the 22nd, and I did that. I called in on---I'll have to look at my---

THE COURT: The trial call date was actually the 30th.

MR. CALDER: The 30th---okay, excuse me, and I called in on the 22nd and left a message, which I believed I had been given the option to do, because I---I informed the Court I'd be out of town on the 30th, and I thought the Court said, as long as I called on or before the date for

the trial call and left a message with regard to the status, that that would be sufficient. That's what I did. I presume the Court got my message of the 22nd, wherein I stated in the message, that I was ready for trial subject to the Court's ruling on my motion to dismiss.

THE COURT: Mr. Calder, I did not get that message. That may have been some error in my office, but what I told you very clearly was that I needed to hear from you by 1:30 on December 30th. I also went through, I believe, some litany about the fact that I had problems with a call trial call because I never receive those messages on time. That I was unable to address issues that needed to be appropriately addressed, and it was made very clear at that time, Mr. Calder, that there was to be a phone call to the Court at which time the Court must have contact with you. I understood that you were on vacation, but you agreed that if we were to set this case, and that trial call, that you would either have someone cover that or you would make sure that phone call occurred, and I believe I very clearly expressed my concerns with receiving a call over the telephone.

MR. CALDER: I understand that, Your Honor, but I don't mean to belabor this point, but this and other cases that I've had in this court, I have never on any occasion made a call to either of the

numbers I was given and reached a human being. I've always left a message, and had---if the Court didn't receive my message of the 22nd, I just wonder whether they would have received my message had it been made on the 30th either.
THE COURT: Well, we won't know that will we, Mr. Calder, because it wasn't made.
MR. CALDER: No, Your Honor. Does the Court wish to address then the motion?
THE COURT: I do.
MR. CALDER: Thank you. Your Honor, with regard to the facts and time line which are basically the facts for a motion of this nature. The defendant was arrested on May 24th, 1999. He was held and brought before the Court on May 25th of 1999, without counsel at that point. So nothing was done other than, at that time, the setting of a pre-trial conference for June9th. In the meantime, I entered my appearance on behalf of the defendant by written entry and plea of not guilty. That was mailed to the Court on June 2nd of 1999, and according to the Court Clerk, received by the Court on June 3rd of 1999. It's our position that that is the arraignment date, commenced the starting of the speedy trial six month period. The pre-trial conference occurred on June 9th of 1999. There was no personal appearance in the courtroom per

se. The conference occurred in the hall with the District Attorney, and then, the case management order, trial date, motions hearing deadline, motions hearing date and trial call date were set. The first trial setting, Your Honor was October 18th of 1999. At the October 7th trial call for that first trial setting, Defense Counsel was informed that the Court calendar would not permit the --- there were other cases superior to our case going to trial on October 18th, and and so the trial was continued on the Court's motion and the second trial which was the November 29th, 1999 date. Again, another trial call was scheduled. I forget what that was, but it was the week before. At that trial call, for the November 29th trial date, again the Court informed Counsel that there was a case that had speedy trial problems that would be proceeding or most likely would be proceeding on the 29th ahead of our case. I informed the Court tha I would be willing and available to trail. That subject was discussed and for that reason the Defense declined to reset the trial date at the trial call, instead preferring to appear on the 29th prepared for trial, to see if something would shake loose. We appeared on November 29th. The other case did go to trial and this Court offered three trial dates to Defense Counsel on the 29th. All three of those dates were

beyond speedy trial rule. The first one was December 6th of '99. The second one was today's date, January 6th of 2000, and the third one, I believe, was January 12th of 2000. We finally settled upon today's date. However, that date was specifically subject to a specific objection on my part to today's date being outside of the speedy trial deadline. While we were in that setting colloquy in the 29th, Your Honor, I offered to try this case on December 1st---excuse me, on December 2nd, which was that Thursday, two days later---three days later and on December 3rd, which was that Friday. Both of those dates were within the speedy trial deadline. Your Honor, for those reasons, I submit that this case should be dismissed. That the defendant's right to speedy trial has been violated. Your Honor, as you know from my motion, there is an alternative argument that has been made, I won't belabor that one, because I don't really think---I don't think it's applicable. I believe that the speedy trial deadline ran on the 3rd, and that there---the deadline did not run on the 9th of December. However, if the Court concludes otherwise, I have made an alternative argument in my motion dealing with that,and I just adopt that by reference. Thank you.

THE COURT: For the People?

MS. HATTER: Your Honor, I'd like to

address Defense Counsel's arguments in reverse order as to how they are laid out in the written motion. The second argument that Defense Counsel puts forth is that even if the December 6th date was within speedy that his inability to---to attend that date should not be attributed to the defendant. I would disagree with Defense Counsel. According to *People v Hammer,* which is actually speaking not exactly on the point, but nonetheless has set forth the reference (inaudible) the cite which is 689 P.2d 1147, Colorado Court of Appeals, 1984. Any delays agreed to by the defendant or requested by his attorney are attributable to the defendant. Therefore, if the December 6th date was, in fact, within speedy, the fact that the defendant couldn't make that date is attributable---is attributable to the defendant. The case which Defense Counsel cites in his motion, (inaudible) is not on point. In that case, three dates were offered to Defense Counsel, all of which were---were within speedy. Defense Counsel decided to accept the last date, After the prosecution agreed to that last date, they subsequently requested a continuance, and the Court found that the Defense Counsel's failure to accept the first date offered within speedy and the time that had elapsed between that date and the third date, that delay was not attributable to Defense Counsel.

That's not the situation that we have here at all. There was a date that was offered. Defense Counsel is the one that made the affirmative decision to not accept that. Consequently, speedy was tolled, as far as the People are concerned. As far as Defense Counsel's first argument that is set forthe in his written motion. I would draw the Court's attention to CRS 16-7-202, which says in relevant part, the Court for good cause shown may accept a plea of not guilty made by an attorney representing the defendant without requiring the defendant to be personally present. Specifically, I would draw the Court's attention to the May language. The Court has the power to require the defendant's presence by adopting the case management plan that the Court has adopted, I would argue that that's exactly what the Court has required. I have a copy of that case management order that was signed and received on June 9th, 1999, which clearly indicates the Court's policies as far as when speedy trial is to run. That's when the defendant received it. So consequently, that's when speedy should run. Next, I would like to assert that Defense Counsel didn't even properly preserve this issue. It's true that Defense Counsel stated that he felt that there was a speedy trial issue that needed to be addressed, but he did not do so with the necessary specificity. I would draw the

Court's attention to CRS 16-1-405 (5.1), which indicates when a trial date is offered by the Court to the defendant, who is represented by Counsel, and neither the defendant nor his Counsel expressly objects to the offered date as being beyond the time within which trial shall be had pursuant to this section, the period for which the trial shall be had is extended until such trial date and may be extended further, et. cetera. Defense Counsel, when he was offered the December 6th date, did not object to that date as being outside of speedy. I would argue that the purpose of this statute is to put the Court on notice that there is a potential problem. Defense Counsel failed to do so. According to *Blades v DaFoe*, 704 P. 2d. 317, a Colorado 1985---the purpose of requiring specific objections is to put the Court on notice that there is a potential problem, to give the Court an opportunity to remedy any such problem. Defense Counsel failed to do that, and by doing so, he failed to preserve this issue. May I have a moment, Your Honor? Consequently, Your Honor, we would be objecting to Defense Counsel's motion.
THE COURT: Mr. Calder, any reply?
MR. CALDER: Thank you, Your Honor. With regard to the argument that the case management order impacts the start of the running of the speedy trial, I would point out that the case management order

was not served upon the Defense until June 9th of 1999. The pre-trial conference was set while the defendant was still pro se before Counsel had appeared, and it was set, according to the setting slip, which is in my possession and should be in the court file, it was set back on his first appearance, which was May 25th of 1999, by which time he had not been advised that by asking for or acquiescing in the setting of a pre-trial conference, he would thereby be tolling or giving up any of his rights with regard to speedy trial or being forced to choose between tolling those rights and giving up the pre-trial conference, as paragraph on of the case management order states, Therefore, that argument is just not applicable, You can't waive your right on Jun 9th to have speedy trial by reason of having participated in a pre-trial conference, when the pre-trial conference was scheduled and you are on bond, and it's set as a bond appearance, before you've even been given the case management order. Your Honor, with regard to the other argument that the prosecution makes here that by participating is a pretrial conference, you somehow give up your right or toll speedy trial. That's been concluded contrary in the case of *Rodman v County Court,* 694 P. 2d 871, Colo. App. 1984 case. It says that the mere request for a pre-trial

conference is not a waiver of speedy trial. I see what the case management order's intent is here, it is to say you either---if you want a pre-trial, you waive or toll speedy trial until then. If you don't want to toll it, then you can't have a pre-trial conference. But, as I've already said, Your Honor, that option wasn't given to the defendant,. prior to the setting of the pre-trial. I was set without any such option having first been given to him back on May 25th. With respect to the argument by the prosecution that Defense Counsel declining to take the January---or the December 6th offered trial date, therefore, under---under some part 5.1 of---of Rule 48, thereby constitutes a delay attributable to the Defense. First of all, I would state to the Court, the Court's been around long enough to know the reason 5.1 was enacted and case law that preceded the enactment of that specific section, is that we don't want Defense Counsel sitting there smugly knowing that a trial date is being offered to him outside the speedy trial and then, not saying anything about it until later when it's too late and then, filing a motion. So, the Court enacted---=of the legislature and the Supreme Court enacted the statute and rule saying well then, what you've got to do is point out and specifically object to the setting beyond the speedy trial deadline. Well, that's

exactly what I did. There were several dates talked about. I also didn't specifically object to the January 12th date, because what reason is there to object to dates that you don't take. I took the date of January 6th and interposed an objection to the court while we were still here on the record and there was time to do something about it, that January 6th was beyond the speedy trial deadline, and that was the date that was relevant, not all of the other dates that may have been offered. You Honor, the --- the point being to give the Court an opportunity to rectify the speedy trial problem while we are still here and within the speedy trial deadline. That's also why I specifically urged the Court---asked the Court to try this case on December 2nd or December 3rd, both of which are within any possible interpretation of the speedy trial deadline here, and this Court said that they could not start a jury trial on a Thursday. Yet, today is a Thursday and today is the date that this case was reset for. Your Honor, I ---I submit that the interpretation that the prosecution is giving to 5.1 and also to the impact effect of my not accepting the January---or the December 6th trial date offer is beyond what is meant by the language of that rule and that provision of the statute and the case law behind it. Finally, Your Honor, as I indicated in my secondary argument

in the motion, the Defense has---had been here as of November 29th twice ready, announced ready, to go to trial on this case. And, we had been to at least one other trial call, motions hearings and everything we were required to be at, ready, on time within the speedy trial deadlines. It is not the Defense's fault, and I'm not blaming the Court either, it's not the Court's fault either, but it's a situation that---that is not blamable on the Defense, that we get up November 29th and there is such a small window left within which to set this case, to wit, through December 3rd, which is only three business days. That is not our fault. The fact that the Court offered a date outside of the speedy trial deadline of December 6th, or outside or inside, whichever it is, but within such a narrow window of time, and Defense Counsel has another court date set, which is what I had, I had another court date in Denver set for that same time, on the 6th, it is not fair to require the Defense to choose between being in contempt of other violation of another Court's docketing requirements and---and showing up and appearing for this Court here or accepting a date within whatever the Court perceives the speedy trial deadline to be in this case. There---there has to be some play there, and that's---that's why I offered to do it the two days before, it

could have been done the two days before, at least as far as the Defense is concerned and I submit that under the circumstances, that the case should be dismissed.

MS. HATTER: Your Honor, Defense Counsel has suggested that 18-1-405, the purpose---the purpose of that statute is to keep Defense Counsel from sitting smugly by while the Court proceeds in making a mistake, and that's exactly what happened in this case, Defense Counsel never stated that he believed that December 6th was beyond speedy, and the Court specifically addressed Counsel with regard to this point. The Court specifically stated that as long as the Court could offer a date that was within speedy, if the Defense Counsel's calendar prohibited him from accepting that date, that that was sufficient as far as the Court's duty was concerned. Defense Counsel never put the Court on notice, which is the whole purpose behind the statute. As far as Defense Counsel's statement that the setting of the PTC--- the pre-trial conference does not automatically constitute a waiver of speedy trial, I would agree with Defense Counsel. It doesn't automatically constitute a waiver. However, according to *Redman v County Court,* And I apologize to the Court, I don't have a cite for that case, the setting of a pre-trial

conference doesn't constitute a waiver of speedy trial unless the defendant is informed of such. And in this case, the case management order had exactly that effect. Thank you.

THE COURT: At this point, the Court will stand in recess for approximately twenty minutes. (off record - back on record) (end of tape 1 - begin tape 2) Okay, we are back on the record (inaudible) and Ms Hatter, you look like you wish to say...

MS. HATTER: Yes, Your Honor, I just want to inform the Court that I have gotten word on Deputy Conrad, the individual that I was telling the Court about before. He is unavailable. He has the flu. He's returned a waiver card and I just wanted to let the Court know, depending on its ruling, that that may be another issue that we have to address.

THE COURT: This matter comes before the Court on Defendant's motion to dismiss pursuant to Colorado Revised Statute, 18-1-405, and Rule 48 of the Colorado Rules of Criminal Procedure. Essentially, alleging that the trial date set for today, December 6th [sic], was in violation of the defendant's constitutional right to a speedy trial. The Court having reviewed the motion filed by defendant, as well as hearing lengthy arguments of counsel, does find and conclude in this case as follows: A Defendant is entitled to be tried within six months of the entry of

a plea of not guilty, citing the case of *People v Slenderwrap, Inc.*, 36 Colo. App. 11536 P. 2d 850, 1975. Defendant must enter a plea before he may take advantage of the restrictions of 18-1-405 of the Colorado Revised Statute, and Rule 48 (b)(1) of the Colorado Rules of Criminal Procedure, citing the case of *People v Wilkinson,* 37 Colo. App. 531, 555 P. 2d 1167, 1967. The six month limitation runs from the date that the plea is entered for the purposes of both section 18-1-405 and Rule of Criminal Procedure 48 (b)(1). Again, the date runs from the date that the defendant's plea is entered. In this case, for the purposes of review, the relevant time line is that the defendant was arrested and charged with one count of harassment, allegedly an act of domestic violence on May 24th of 1999. On May 25th of 1999, the defendant appeared on bond without counsel, and was advised by Magistrate Gresh, if my memory serves me correctly. At that time, according to the file and at this point the Court does take judicial notice of the file, 99M999, and its contents. The defendant was advised of his rights and a mandatory restraining order was issued pursuant to 18-1-1001. At that point, the matter was set for a pre-trial conference and that was set in Division M1, to be returned to Division B, this Judge's division, for a pre-trial

conference on June 9th of 1999 at 1:30. The notice to set indicates that the matter is to be set for a pre-trial conference, that the continuance is requested by the defendant, that the defendant has retained an attorney who could not be present on this date. At that point, there was not a request that the defendant enter a plea. Again, in order for the applicable statute of limit---or statute and rule regarding speedy trial, the defendant must enter a plea. A plea was not entered on the date of first advisement. At which time, subsequently, filed with the Court on June 3rd of 1999, Defense Counsel Stephen Calder filed with the Court entry of appearance, waiver of formal arraignment, pleas of not guilty and demand for a trial to a jury of six. Defendant then appeared with Counsel for the pre-trial conference on June 9th of 1999. Pre-trial conference was conducted and Defense Counsel nor his client appeared for advisement before the Court on that date. On that date, a case management order was signed, stamped by County Judge, Division B, this Judge, received by Stephen Calder, date 6-9-99. The Court does note at this point that there is a note attached to the case management order advising that an entry of appearance is needed in the file. Apparently, at this time, the entry had

not been received by the Division at which time the case management order was signed, and the case was set for trial. Paragraph 1 of the case management order states no plea will be accepted in any case set for a pre-trial conference until the pre-trial conference has been held. Therefore, the applicable speedy trial will not begin to run unitl a case has actually be [sic] set for trial. The tolling of the applicable speedy trial period until a pre-trial conference has been held shall be a condition of setting a pre-trial conference in this case. Where the defendant objects to the tolling of speedy trial until a pre-trial conference has been held, no pre-trial conference shall be set. Instead, the case will be set for trial and the deadlines set out below shall apply. This matter was then set for trial on June 9th. The matter was set for motions hearing on August 19th of 1999 at 9:30 a.m., and for trial to jury on October 18th of 1999 at 8:30 a.m. At that time, the notice of future court appearance in the file, stated that the speedy trial date is December 8th of 1999. That setting slip is then signed by Defense Counsel, Mr. Stephen Calder. The matter came for trial, actually to trial call, on October 7th, at which time Defense appeared, as did the People, and parties announced ready. The Court could not proceed to trial given the fact that there were several cases set

for speedy and continued the case on its own motion to be set within speedy trial. Trial call was set for November 24th, 1999, at 1:30. trial to jury, November 29th, 1999 at 8:30. Again, speedy trial is listed as December 8th of 1999, and the notice of future court appearance, which has speedy trial date listed in two places, is signed by Mr. Calder. The Court---the matter then came before the Court for a trial call, actually on November 29th---I think that may be a misprint. At that point the Court did again have other cases proceeding on speedy before Mr. Nelson's case. At that point, Defense Counsel and defendant wished to trail for a trial to proceed as scheduled on November 29th. That's right, trial call was November 24th and trial to jury, November 29th. Defendant and Counsel appeared on that date. At that point, the Court did have another case proceeding to trial. The Court continued the case on its own motion, and offered trial dates to the defendant, including December 6th of 1999, January 6th of year 2000, January 12th of the year 2000. At that point, Defense Counsel stated he could not appear on the December 6th, 1999, date as he did have a conflict in his schedule on that date. Defense Counsel offered to try the case on December 2nd and December 3rd. However, this Court's docket did not permit the case to be

scheduled on those days as the Court had a case preceding to trial to Court on December 2nd and did not have a jury to sit and hear this case. This case---this Court's normal criminal settings for jury trials are every Monday, with the exception of the week prior to Christmas of 1999, at which time the Court was not in session. At that time, the matter was set for jury trial to begin today, January 6th of the year 2000. At that point, Counsel registered an objection that the case---that the case was set for trial outside of the speedy trial and that the Court having previously found that by the Defense Counsel's failure to accept a date that was given within speedy, that speedy was waived at a minimum unitl the date of setting, today, January 6th, and again an objection was registered, that that did not constitute a waiver and that the case was set outside of speedy trial. That being the facts of the case to this point in time. In order to determine whether the defendant's right to speedy trial has been violated the Court is to conduct a balancing test, citing the case of *People v Spencer,* 182 Colo. 189, 152 P. 2d 260, a 1973 case, also *People v Chavez,* at 779 P. 2d 375, Colorado 1999. A balancing test is a four part test, four factors are to be considered, the length of the delay, the reason for the delay, the the defendant's assertion or demand for a speedy trial,

and the prejudice to the defendant, citing the case of *People v Spencer,* id, *People v Fears*, 962 P. 2d 272, Colorado Court of Appeals case, 1997. A request for a pre-trial conference in a criminal case without more, does not constitute a waiver of the speedy trial right, nor a delay caused at the defendant's insistence to be excluded from speedy trial calculations, citing the case of *Rodman v County Court,* 964 P. 2d 871, a Colorado Court of Appeals 1989 case. In this case, the Court finds that at the time that the defendant set the case for speedy---excuse me, for pre-trial conference, a plea had not been entered. Therefore, the applicable speedy trial period had not begun. Although it is clear that docket congestion would not warrnat a setting beyond speedy, it is a factor in determining the reasonablenesss of the delay within the statutory and procedural time periods of subsection 6 (e) of Rule 48 (b), citing the case of *Pinelli v District Court,* 197 Colo. 555, 595 P. 2d 225, a 1979 case. There are essentially two aspects of defendant's argument regarding the violation of speedy trial. and the first is premised upon the fact that the defendant's speedy trial date was December 3rd, six months from the time that the defendant entered a written plea of not guilty and entry of appearance by counsel. That the date offered by the

Court of December 6th was outside of that speedy trial date. So, that is the first argument which the Court will address. Pursuant to the case of *Harrington v District Court,* cited at 192 Colo. 351, 559 P. 2d 225, Colorado Supreme Court, 1977 case. The Court in its decision, although deciding the case on different grounds, indicates that a wirtten plea of not guilty does not comply with Court rules, citing Colorado Rule of Criminal Procedure, Rule 10, 10 (a), 11 (c), 48 (b). In this case, the Court did find that the applicable speedy trial period began upon the date of the entry of the written plea, where the defendant affirmatively proceeded on the basis that the plea of not guilty had been entered when setting the case for trial, and the court, as well as the prosecution, did not comment on the written entry of the plea and proceeded as if the plea had been accepted. At that point in this case, the Court set the matter for trial eight months after the written entry and the Court found that there had been a violation. As to criminal rule of procedure 10, it states that an arraignment shall be conducted in open court and 10 (a) permits the Court to accept pleas entered in writing by the defendant or orally made by his counsel in certain misdemeanor cases. Neither of these rules expressly permits written pleas made by Defense Counsel. In this

case, as the Court previously found, the defendant had not entered the plea on the record at any time prior. The written entry was then received in the Clerk's office on June 3rd of 1999. On June 9th of 1999, Defense counsel signed the pre-trial case management order acknowledging that a plea would not be accepted until such time as a pre-trial conference had occurred, if that pre-trial conference was requested, and the case was set for trial. The Court distinguishes at this time the case of *Harrington v District Court,* where the County Court, the District Attorney and the petitioner affirmatively proceeded on the basis that the plea of not guilty had been entered when setting the case for trial in that particular case, i.e., that written entry of appearance. To the contrary, in this case, through the case management order, there was affirmative expression by the court that a plea would not be accepted and that the applicable speedy trial would begin at the time that the case was set for trial. That was acknowledged by Defense Counsel and all proceeded under the understanding that that was the applicable speedy trial date. In addition, at the time that the matter came before the Court on November 29th, of 1999, at which time the December 6th 1999 date was offered, Defense Counsel stated that he was unable to accept that date, based

upon his calendar. At that time, there was no mention to place the Court on notice that there would be an argument by counsel that the December 6th, 1999, date was set outside of speedy to allow the court an opportunity to address the issue and if necessary, offer and alternative date. At this point, the Court does find that based upon Defense Counsel's first argument, that there was not a violation of speedy trial by offering the December 6th, 1999 date. That that was a date within speedy trial. That at the time of the pre-trial---first of all that the pre-trial conference was requested by the defendant. At his insistence, and that is noted in the court file, that Defense Counsel affirmatively acknowledged the pre-trial case management order and accepted speedy trial date as December 8th. As to Counsel's second argument that failure to set the case within the court's speedy trial date of December 8th, based upn defendan's Counsel's inability to appear on the date of December 6th, was a violation of the defendant's right to a speedy trial. The Court cites the case of *People v Wilson,* at 972 P. 2d 701, a Colorado Court of Appeals case, 1998, certioari denied, March 1 of 1999. This case stands for the proposition that Defense Counsel's motion to dismiss on speedy trial ground, which was based on Counsel's unavailability for trial on

scheduled date near expiration of speedy trial and inability to find a replacement of otherwise proceed was tantamount to a request for a continuance in order to protect the defendant's Sixth Amendment right to counsel. and thus, the Trial Court did not error in extending the defendant's speedy trial period for an additional six months. In this particualr case, the court had continued the case on it's own motion because of docket congestion and had reset the matter within speedy trial. Defense Counsel then informed the Court that he would be unable to appear. The reason for the inability to appear included vacations, other jury trials, and problems with coverage, no attorney to cover. Again, in this case, the court denied the motion to dismiss finding that the trial could go forward within the original speedy trial period, but for Defense Counsel's unavailability. In the case of *Wilson v People,* the Court cites the case of *People v Chavez,* at650 P. 2d 1310, Colorado Appellate 1982 case. Defense Counsel advised the Court that he would not be available to try the case on the scheduled trial date because of scheduling conflicts, nor was he available until after the expiration of the speedy trial period, Division of the Appellate Court concluded that the actions of Defense Counsel were tantamount to a request for a continuance. In the case of *People v*

Wilson, **the court found that the delay in the trial was due to the scheduling conflicts of the defendant, thus making the delay chargeable to the defendant, and in that case, actually found that there was a six month waiver of speedy trial. In this case, the Court does believe that the date of December 6th, 1999, was a date offered to Defense Counsel within the speedy trial period. That although Defense Counsel offered to try the case on December 2nd, that was not possible in the Court's schedule, and certainly reasonable basis for the Court's docket to be considered in determining this case. Defense Counsel's failure to accept that date within speedy was tantamount to a waiver and that today's date of January 6th, 2000, is an appropriate date to proceed to trial within the defendant's constitutional rights, and the motion to dismiss is denied on that graounds as well. Mr. Calder, how do you wish to proceed?**

MR. CALDER: Judge, as I indicated, Your Honor, I would like to ask for time to file a 106 proceeding rather than proceed to trial and possible violation of my client's speedy trial right. And so, I would request that at this time. Obviolsly, the delay attributable to my request would be chargeable to me from this day forward.

THE COURT: Do you have any comment in that regard, Ms. Hatter?

MS. HATTER: No, Judge.
THE COURT: At this point, the continuance to proceed will be granted.
MR. CALDER: Thank you, Your Honor.

COUNTY COURT, COUNTY OF DOUGLAS, STATE OF COLORADO
Action No. 99M999 Division B

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PEOPLE OF THE STATE OF COLORADO
Plaintiff
v
JOHN WALTER NELSON
Defendant

I certify that I transcribed this record from the tape-recording of the above-entitled matter which was heard on January 6, 2000, before the Honorable Susanna Meissner-Cutler, Judge of the Douglas County Court.

I further certify that pages 2 through 29, inclusive, constitute a complet and accurate transcript of the tape-recorded Hearing, based on the audio facilities of these tapes and my ability to understand them.

s/ Pat Breitkreutz, 1-31-00
Court Transcriber

COUNTY COURT, COUNTY OF DOUGLAS, STATE OF COLORADO
Action No. 99M999 Division B

TRANSCRIBER'S TRANSCRIPT

PEOPLE OF THE STATE OF COLORADO
Plaintiff
v
JOHN WALTER NELSON
Defendant

THIS MATTER came on for hearing on November 29, 1999, before THE HONORABLE SUSANNA MEISSNER-CUTLER, Judge, of the County Court, sitting in Castle Rock, Colorado.

APPEARANCES:
FOR THE PEOPLE: GINENE HATTER
FOR THE DEFENDANT: STEPHEN CALDER

THE COURT: Next on the record on 99M999, People versus John Nelson.
MS. HATTER: Ginene Hatter appearing on behalf of the People.
MR. CALDER: Good morning, Your Honor, Steve Calder appearing for the defendant who is present.
THE COURT: All right, I think everybody announced ready for this case on Wednesday, and Counsel it looks as though there is another case that will be going, so we will reset this case on the Court's own motion within speedy, which would make this case going to trial next Monday.
MR. CALDER: Well, Your Honor, I am not available next Monday. I'm in court then in Denver, 8:00 a.m., a criminal matter.
THE COURT: The next available date then that we have is in January.
MR. CALDER: I'm happy to do that. I won't waive speedy trial to do that, Your Honor, but if that's the Court's next available date. I would, for the record, state that I am available on Thursday, December 2nd and Friday, December 3rd to try the case.
THE COURT: We don't. We do trials on Monday.
MR. CALDER: Okay, the date the Court is resetting this to is in January, Your Honor?
THE COURT: Yes, and I actually do have a Thursday setting the 1st Thursday, which

is---we have either January 6th or Monday, January 10th.
MR. CALDER: Can I have just a moment to get my reading glasses out. I'm sorry.
THE COURT: Your may.
MR. CALDER: Again, that was Thursday the 6th of January or Monday the 10th?
THE COURT: Right.
MR. CALDER: Let's take the 6th, Your Honor. Again, this---for the record, is over my objection. Is that 8:30, Your Honor?
THE COURT: Yes, I do have a matter in the afternoon on that Thursday, so we'll have to take a break in our trial for a bit of time, but---
MR. CALDER: I think this is a matter than can easily be tried in three quarters of a day.
THE COURT: Well, it's kind of in the middle of the day that I have a meeting. I don't know if that will make any difference on your setting?
MR. CALDER: No, it shouldn't. I think we can complete it in a day even with the interruption.
THE COURT: Okay, that will make trial call, I don't know when we are doing trial call, on the Thursday before, I guess, which is the 30th at 1:30.
MR. CALDER: Your Honor, is it necessary, this will be the third trial call if we set another one. Is it necessary to have another trial call?

THE COURT: I don't really have a problem, but my objection to it is every time that I tell counsel that they don't need to be here, but they have to call in and they have to talk to the DA and they have to tell me whether they are ready, no one ever follows through with that, and then, I have all kinds of people ready to go to trial, and I have a problem with that. So, Counsel, if you are willing to take that responsibility, but I will tell you, if I don't hear from you, I am going to waive speedy and continue your case.
MR. CALDER: I'd be happy to commit to that. I'm going to be out of town during the holidays, so I---would it be all right if I made that call before the holidays?
THE COURT: No, you have to do it on that day, on the 30th.
MR. CALDER: On the 30th, I'll make it from out of town, Is there a time that the Court wants that call?
THE COURT: Needs to be before 1:30, and I don't even care if you contact Ms Hatter, you know, go through her, that's fine, but I want to have an announcement of ready. What happens all the time is that I tell people that they don't need to be here, but I have to have this call, and I never get it.
MR. CALDER: Now, I am not sure. I am supposed to communicate this to the DA or to the Court Clerk?
THE COURT: I don't care which, as long

as someone knows for sure you're announcing ready and going.
MR. CALDER: Okay, could I get the Court's inside clerk's telephone number?
THE COURT: It's 303-663-and you can leave---either 7234 or 7235.
MR. CALDER: Very well, Your Honor.
THE COURT: Okay.
MR. CALDER: I'll do it that way.
THE COURT: Thank you.
MR. CALDER: Thank you.

COUNTY COURT, COUNTY OF DOUGLAS, STATE OF COLORADO
Action No. 99M999 Division B

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PEOPLE OF THE STATE OF COLORADO
Plaintiff
v
JOHN WALTER NELSON
Defendant

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s/ Pat Breitkreutz, 1-31-00
Court Transcriber

DISTRICT COURT, DOUGLAS COUNTY, COLORADO
Court Address: 4000 Justice Way, Castle Rock, CO 80104
Case number: 00 CV 76 Ct. Rm. 1

Plaintiff(s): JOHN W. NELSON

Defendant(s): HONORABLE SUSANNE (SIC) MISSNER (SIC)-CUTLER

ORDER

Plaintiff is the defendant in 99M999, filed in the County Court, Douglas County, Colorado. To avoid confusion, this court shall refer to plaintiff in this proceeding by that party designation and shall refer to the defendant as the trial court. Plaintiff's complaint, pursuant to C.R.C.P. 106, sought dismissal of the county court action because the trial court set plaintiff's trial date beyond the applicable speedy trial period. Plaintiff asserted this relief was appropriate as the trial court abused its discretion and exceeded her jurisdiction. The relief requested by the plaintiff is denied.

The factual basis is adequately set forth in the plaintiff's opening brief. After review, the Court concluded that it is unnecessary to determine when the speedy trial period commenced because there was no express

objection to the offered trial date as being beyond the speedy trial time period. Section 18-1-405.1 (5.1), 6 C.R.S. (2000) provides:

> **If a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as being beyond the time within which such trial shall be had pursuant to this section, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provisions of this section.**

Here, plaintiff, represented by counsel, was offered a trial date. No express objection was made that the offered date was beyond the applicable speedy trial time period. Not having objected, the plaintiff cannot be heard to complain that the extended trial date of December 6 was beyond the speedy trial deadline.

With respect to plaintiff's second issue, treating plaintiff counsel's unavailability on the date provided as a waiver of speedy trial was not an abuse of discretion. The resultant setting within the period that arose by reason of the waiver was not a setting beyond the applicable speedy trial period and did not deprive the trial court of jurisdiction.

Section 18-1-405 (1), 6 C.R.S. (2000) provides, in essence, that if a defendant is not

brought to trial within six months form the date of the entry of ta plea of not guilty, the pending charges shall be dismissed. That provision is subject to exceptions.

One exception is set forth in section 18-1-405 (3), 6 C.R.S. (2000) to the effect that if the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six month's period form the date upon which the continuance was granted. Another exception is set forth in section 18-1-405 (6)(f), 6 C.R.S. (2000) to the effect that the period of any delay caused at the instance of the defendant is excluded from the computation of time within which a defendant shall be brought to trial.

Here, the trial court construed plaintiff counsel's unavailability as a request for a continuance and thereafter set the date. The trial court's action was appropriate. See *People v. Wilson,* 972 P. 2d 701 (Colo. App. 1998); *People v. Hamer,* 689 P. 2d 1147 (Colo. App. 1984).

Because the trial court neither abused its discretion nor acted in excess of her jurisdiction, the relief requests should be denied.

It is therefore ordered:

1. Plaintiff's request that action number 99 M 999 be dismissed with prejudice is denied.

2. Douglas County Case No. 99 M 999 shall be scheduled for trial.

Date: January 30, 2001.

BY THE COURT:

s/Thomas J. Curry
District Court Judge

xc: Stephen P. Calder, Esq.
Dianne E. Eret, Esq.
Honorable Susanna Meissner-Cutler

SUPREME COURT, STATE OF COLORADO
Court Address: Two East 14th Avenue, Denver, Colorado 80203
Case number: 01 SA 74

In re:

Plaintiff:

THE PEOPLE OF THE STATE OF COLORADO,

Defendant:

JOHN WALTER NELSON

ORDER OF THE COURT

Upon consideration of the Petition for Rule to Show Cause filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 28, 2001.

[SEAL OF THE SUPREME COURT STATE OF COLORADO]

cc: Stephen P. Calder
Pavilion Tower One, Ste. 400
2851 S. Parker Rd.
Aurora, CO 80014

Dianne E. Eret
Assistant Attorney General

Clerk of the court
Douglas Combined Courts
4000 Justice Way, Suite 2009
Castle Rock, CO 80104

Honorable Susanna Meissner-Cutler
Douglas Combined Courts
4000 Justice Way, Suite 2009
Castle Rock, CO 80104

Supreme Court State of Colorado
Certified to be a full, true and correct copy.
March 1, 2001.
MAC V. DANFORD, Clerk of the Supreme Court
By s/E. [illegible], Deputy Clerk
[COURT SEAL]